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U.S. Department of Homeland Security  
U. S. Citizenship and Immigration Services  
Office of Administrative Appeals MS 2090  
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U.S. Citizenship  
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FILE:

LIN 07 251 50229

Office: NEBRASKA SERVICE CENTER Date: OCT 15 2009

IN RE:

Petitioner:

Beneficiary:

PETITION: Immigrant petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

**INSTRUCTIONS:**

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

Perry Rhew  
Chief, Administrative Appeals Office

**DISCUSSION:** The employment-based immigrant visa petition was denied by the Director, Nebraska Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a hotel and conference hall. It seeks to employ the beneficiary permanently in the United States as a database administrator pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). The petition is accompanied by a Form ETA 9089, Application for Permanent Employment Certification, which was certified by the Department of Labor. The Form ETA 9089 indicates in Block H that "Other" is as an alternate level of education required for the job. "Other" is described in Block H, 8-B, as "[a]ny suitable combination of education, training and/or experience equivalent [sic]."

The director determined that the Form ETA 9089 failed to demonstrate that the job requires a professional holding an advanced degree or the equivalent of an alien of exceptional ability and, therefore, the beneficiary cannot be found qualified for classification as a member of the professions holding an advanced degree or an alien of exceptional ability. 8 C.F.R. § 204.5(k)(4). The director also determined that the petitioner failed to establish that the beneficiary possesses the foreign equivalent of a U.S. master's degree. The director denied the petition accordingly.

On appeal, counsel states the following in the Form I-290B:

Please be advised that a brief in support of this appeal will be submitted to the AAO within 30 days. Notwithstanding, the employer contends that the Service erroneously determined that the position of database administrator is not a "profession" and that the job does not require a professional holding of an advanced degree. The employer also contends that the beneficiary possesses the required foreign educational equivalency.

It is noted that, as of the date of this decision, the AAO is not in receipt of a brief or additional evidence.

The record shows that the appeal is properly filed and timely. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

In pertinent part, section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. An advanced degree is a United States academic or professional degree or a foreign equivalent degree above the baccalaureate level. 8 C.F.R. § 204.5(k)(2). The regulation further states: "A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree." *Id.*

Section 203(b)(2) of the Act also includes aliens "who because of their exceptional ability in the sciences, arts or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States." The regulation at 8 C.F.R. § 204.5(k)(2) defines "exceptional ability" as "a degree of expertise significantly above that ordinarily encountered."

Here, the Form I-140 was filed on July 27, 2007. On Part 2.d. of the Form I-140, the petitioner indicated that it was filing the petition for a member of the professions holding an advanced degree or an alien of exceptional ability.

The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also*, *Janka v. U.S. Dept. of Transp.*, *NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal. On appeal, counsel does not specifically address whether the job described in the Form ETA 9089 requires a professional holding an advanced degree or the equivalent of an alien of exceptional ability.

The regulation at 8 C.F.R. § 204.5(k)(4) states in pertinent part that "[t]he job offer portion of an individual labor certification, Schedule A application, or Pilot Program application must demonstrate that the job requires a professional holding an advanced degree or the equivalent of an alien of exceptional ability."

In this case, the job offer portion of the Form ETA 9089 indicates that "Other" is an alternate level of education required for the job. The employer described "Other" in Block H, 8-B, as "[a]ny suitable combination of education, training and/or experience equivalent [sic]." It is important to note that the employer could have chosen none, high school, associate's, bachelor's, master's, or doctorate as an alternate level of education. Accordingly, the job offer portion of the Form ETA 9089 does not require a professional holding an advanced degree or the equivalent of an alien of exceptional ability. However, the petitioner requested classification as a member of the professions holding an advanced degree or an alien of exceptional ability. In this matter, the appropriate remedy would be to file another petition with the proper fee and required documentation.

The evidence submitted does not establish that the Form ETA 9089 requires a professional holding an advanced degree or the equivalent of an alien of exceptional ability, and the appeal must be dismissed.<sup>1</sup>

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<sup>1</sup>The director also determined that the petitioner failed to establish that the beneficiary possesses the foreign equivalent of a U.S. master's degree. On appeal, counsel failed to specifically address this issue, or to address whether the Form ETA 9089 demonstrates that the job requires a professional holding an advanced degree or the equivalent of an alien with exceptional ability. As noted above, no brief or evidence has been received by the AAO. The regulation at 8 C.F.R. §§ 103.3(a)(2)(vii)

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

**ORDER:** The appeal is dismissed.

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and (viii) states that an affected party may make a written request to the AAO for additional time to submit a brief and that, if the AAO grants the affected party additional time, it may submit the brief directly to the AAO. As stated in 8 C.F.R. § 103.3(a)(1)(v), any appeal that fails to specifically identify any erroneous conclusion of law or statement of fact will be summarily dismissed. Accordingly, if the appeal were not being dismissed for the reason set forth above, the appeal would be summarily dismissed.